

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of W.S., Rockville Community)
School Corporation, and the Covered)
Bridge Special Education District) **Article 7 Hearing No. 956-97**

SYNOPSIS

Although the original request for a due process hearing under 511 IAC 7-15-5 (“Article 7,” the rules and regulations of the Indiana State Board of Education for special education) was more concerned with the possible expulsion of W.S. (hereafter, the Student) for lack of legal settlement, the eventual issue for the hearing was concerned with whether or not the Rockville Community School Corporation and the Covered Bridge Special Education District (collectively, the School) developed and implemented the Student’s individualized education program (IEP) for the 1996-1997 school year in concert with the requirements of Article 7. The Independent Hearing Officer (IHO) found in favor of the school but, nevertheless, still issued orders with respect to the development and implementation of the Student’s IEP for the 1997-1998 school year. The Student appeals, alleging *inter alia* that the IHO’s Findings of Fact and Conclusion of Law are internally inconsistent with respect to the Student’s actual educational needs, and conflict with the need to issue Orders when no violation of Article 7 was determined. The School argues that the record supports the IHO’s written decision and that the Orders do not relate to the IEP at issue during the hearing. The Indiana Board of Special Education Appeals (BSEA) reviewed the matter without the presence of the parties and without oral argument. As a result of this review, the BSEA determined that the IHO’s Findings of Fact are in error with respect to his interpretation of present and past evaluative data, but this does not affect his Conclusions of Law or the resulting Orders.

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

W. S., a 15-year-old student with an “Orthopedic Impairment”(OI), resides with his grandparents within the boundaries of the School. W.S. has resided with his grandparents for nine years and has attended the School during this period. He was in the eighth grade when his grandmother requested a due process hearing on March 18, 1997, to challenge several alleged procedural anomalies committed by the School and a threatened expulsion for alleged lack of legal settlement.¹

Curtis L. Leggett, Ph.D., was appointed on March 19, 1997, as the IHO pursuant to 511 IAC 7-15-5 of Article 7. On April 4, 1997, the School requested a thirty (30) day extension of time. The IHO granted the request by order dated April 8, 1997, and set June 1, 1997, as the date by which a hearing must be conducted and a written decision issued.

A telephone prehearing conference was conducted on April 17, 1997, to discuss hearing procedures, determine the issues for the hearing, and establish a date and place for the hearing. The School’s expulsion proceedings were held in abeyance due to the “stay put” provision of Article 7, which requires a student to remain in his current educational placement unless the parties agree otherwise. 511 IAC 7-15-5(h). The grandparents sought to establish legal guardianship during this period. May 12, 1997, was established as the hearing date, with the hearing to be conducted at the meeting room of the Rockville Christian Church. The parties resolved three issues prior to the hearing, including the issue of expulsion for alleged lack of legal settlement. The parties agreed that there remained one issue for the hearing:

Whether or not the School was implementing the IEP developed for the Student for the 1996-1997 school year.

¹Indiana law permits public schools to expel students for lack of legal settlement. I.C. 20-8.1-5.1-11. Although characterized as an “expulsion,” the additional penalties associated with disciplinary expulsions are not present, such as restrictions upon enrolling in another school district or having one’s driver’s license suspended. The Indiana State Board of Education has administrative appellate review of legal settlement expulsions. See I.C. 20-8.1-6.1-10(a)(1). However, where the legal settlement dispute involves a student who is eligible for special education services, such as W.S., this becomes a placement issue suitable for resolution through the State Board’s rules for special education due process at 511 IAC 7-15-5 and 511 IAC 7-15-6. The State Board specifically follows this procedure for transfer tuition disputes directly involving a student with disabilities. See 511 IAC 1-6-4.

The IHO incorporated these discussions into a prehearing order dated April 21, 1997, as required by I.C. 4-21.5-3-19 of the Administrative Orders and Procedures Act. The IHO fully advised the parties and their representatives of their hearing rights.

The hearing was conducted on May 12, 1997. At the request of the grandparents, the hearing was open to the public and the Student was present.

IHO's Findings of Fact

The IHO determined fourteen Findings of Fact (FOF). He found that the Student is fifteen years old and qualifies for special education services as a student with an OI (511 IAC 7-11-10) due to a form of cerebral palsy (mild left hemispheric involvement). The Student's cognitive abilities are said to be in the low average to borderline range, with mathematics considered an area of strength while language (particularly reading) is considered an area of relative weakness. Case Conference Committee (CCC) meetings were convened to review the Student's IEP six (6) times between May of 1996 and April of 1997. The Student is receiving "notably low academic grades in many of his school subjects." Although his grandparents and others work with the Student on a consistent basis, a "significant number of assignments [are] not turned in by the student." CCC notes from 1995 indicate the Student had not been taking responsibility for his work. Although the CCC focused on the Student's educational needs, "[i]t was not clear from the evidence and/or the direct testimony what the role of the required Individualized Transition Plan [ITP; see 511 IAC 7-13-4] component was as an integrated part of the development of the current Individualized Education Program." The IHO also opined that the Student may actually be functioning in the Mildly Mentally Handicapped (MiMH) rather than the low average range.

IHO's Conclusion of Law

From the fourteen (14) Findings of Fact, the IHO reached one somewhat lengthy Conclusion of Law.² The IHO concluded the Student is appropriately identified as having an OHI, and that his significant educational problems are not the direct result of his disability or his placement. Although the Student is said to possess cognitive abilities in the low average category, his abilities may very well be in the MiMH range, particularly as the gap between his social and academic abilities relative to his peers has been widening over time. Although the IEP had been developed and implemented by the CCC in accordance with Article 7, the ITP component is unclear as to the

²It is possible the IHO meant each paragraph to be a separate Conclusion of Law. However, he failed to number any of the rhetorical paragraphs. This greatly hinders an aggrieved party from citing specific areas of an IHO's written decision to which exception is taken. See 511 IAC 7-15-6(e)(3). This can also affect the review.

transition and ongoing adult services the Student requires or may require. However, neither party raised issues in this respect. The IHO concluded by encouraging the parties to communicate better, and gave examples where communication faltered.

IHO's Orders

The IHO made three (3) Orders. These are reproduced below.

- Order #1: The local school district and/or its representatives are to be considered as having met their requirement for the evaluation of the student and the development of an appropriate Individual Education Plan for the student. In addition, the local school corporation and/or its representatives are to be considered as having met the requirements for implementing that existing Individual Education Plan.³
- Order #2: During the Case Conference procedures for the design of the Individual Education Plan for the 1997-1998 school year, the Case Conference membership is to consider closely each of the following:
- a. the appropriate expectations of performance related to the specific measured cognitive abilities of the student.
 - b. the development of a clearly established grading procedure/system for the student that is to be shared with all assigned instructional personnel.
 - c. an every two week communication process between the home and school which would indicate the work/lesson completion needs of the student.
- Order #3: In the activities undertaken to design the Individual Education Plan for the 1997-1998 school year, the Case Conference membership is to include the specific development of an Individual Transition Plan process for the student.

The IHO's written decision was issued on May 30, 1997. Although the record does not contain any indication how or when the written decision was served on the representatives of the parties, the Indiana Department of Education, Division of Special Education, did receive its copy on June 9, 1997.

³The BSEA notes that the IHO's Order #1 is, in fact, not an Order but a Conclusion of Law.

PROCEDURAL HISTORY OF THE APPEAL

Student's Petition for Review

W.S., by counsel, filed his Petition for Review on July 8, 1997, raising objections to or basing objections upon FOFs 5, 6, 8, 9, 10, 11, 12, 13 and 14, as well as the Conclusion of Law and all three of the Orders. W.S.'s objections are generally stated as follows:

1. While the IHO noted in FOF No. 5 that the Student may be MiMH, he did not order additional assessment in this respect. Proper identification may affect the Student's educational programming and eventual ability to live independently.
2. Although FOF No. 6 determined the Student's projected abilities were not at significant variance with his tested performance, this is contradicted by FOF No. 10, which noted the Student was receiving notably low grades in many of his academic areas.
3. FOF No. 8, which lists the six (6) CCC meetings held between May of 1996 and April of 1997, does not include information regarding the School's exclusion of the grandparents from three of these meetings or the School's refusal to discuss with them the Student's status.
4. If in FOF No. 11 the IHO found the grandparents and others were assisting the Student in completing his assigned schoolwork, wouldn't the School have the responsibility to notify the grandparents when school work was not received?
5. The teachers were confused regarding the modified grading method for the Student. The School has the responsibility for ensuring affected teachers are aware of the contents of a Student's IEP, including being aware of the grading method.
6. It is erroneous to conclude the IEP developed and implemented for the Student is appropriate even though the ITP is incomplete and the Student cannot read.
7. The School could not have been determined to have acted in "good faith" given the deliberate creation of an atmosphere of hostility through refusal to communicate and the threat to expel the Student.
8. The IHO contradicts his FOFs and Conclusion of Law that the School complied with IEP procedures, including a modified grading method, when he determined it necessary to issue specific orders regarding the development of the IEP, including the development of a clearly established grading procedure which is to be shared with assigned instructors.

The School's Response to the Petition for Review

The School, by counsel, filed on July 18, 1997, its Response to the Petition for Review. Generally, the School argues:

1. The Student is not specific as to the dearth of evidence in the record which would fail to support any of the FOFs or the Conclusion of Law determined and reached by the IHO. A review of the record will indicate that there is sufficient evidence to support the IHO's written decision.
2. The psycho-educational evaluation conducted November 13, 1996, generated scores which would seem to place the Student in the MiMH range of intelligence. However, the evaluator did not consider the results as reliable indicators of the Student's cognitive abilities because of the intervening effect of the Student's cerebral palsy upon performance. The IHO was not compelled to find that the Student is, in fact, MiMH.
3. The Student's academic achievement is expected to lag behind his peers. However, his low grades are not the result of his disability but are the result of his not providing his teachers with sufficient work. The School also maintains that the grandparents were notified when the Student failed to turn in his homework.
4. The record indicates that the grandparents were invited to CCC meetings and participated. The School denies the grandparents were excluded from any CCC meeting.
5. Although the Student's IEP for the 1995-1996 school year contained a modified grading system, the IEP at issue in this hearing--for the 1996-1997 school year--contained no such modified grading system. The School denies the teachers were not aware how to grade the student and also denies the teachers did not know who the "teacher of record" was.
6. The School denies that its personnel would not communicate with the grandparents. The record, the School maintains, will show that the School accommodated the grandparents when communications became strained. In addition, the School denies the Student cannot read, noting that one of the Student's witnesses acknowledged the Student could read at a third grade level.
7. The IHO's Orders Nos. 2 and 3 do not relate to the IEP for the 1996-1997 school year, which was at issue. His Orders relate instead to the Student's IEP for the upcoming 1997-1998 school year, which was not at issue.
- 8.

Review by the Indiana Board of Special Education Appeals

The School, by counsel, requested an extension of time on August 14, 1997, which was granted by the BSEA on that date. The BSEA established September 8, 1997, as the date by which review must be conducted and a written decision issued.

On August 15, 1997, the BSEA notified the parties that, pursuant to 511 IAC 7-15-6(k), it would conduct its review without oral argument and without the presence of the parties. However, the review would be recorded and a transcript made. A copy of the transcript will be mailed to the representatives of the parties at no charge.

The BSEA, with all three members present, convened on September 4, 1997, in Room 225, State House, Indianapolis, to conduct its impartial review. The review began at 11:15 a.m. local time.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The BSEA reviewed the record of the proceedings, including the transcript and the documents submitted by the parties. In consideration of the record, the Petition for Review, and the Response to the Petition for Review, the BSEA now makes the following Combined Findings of Fact and Conclusions of Law.

1. The BSEA, under 511 IAC 7-15-6, is the entity responsible for the review of final, written decisions of Independent Hearing Officers appointed pursuant to Article 7. The BSEA has jurisdiction in this matter.
2. The IHO, in his Finding of Fact No. 5, determined the following:
 5. Evidence and direct testimony established that the student's cognitive aptitude was within the low average to borderline category. However, evidence established that in previous psychological testing (1991, 1994), the student was cited as having cognitive aptitude within the mildly mentally handicapped range. No notation of his having been found eligible for services under the Mentally Handicapped category were [sic] noted in the record.

The record does not support the finding that previous psychological testing placed the student within the MiMH range. Accordingly, the BSEA, by unanimous vote, amended the Finding of Fact by eliminating all but the first sentence. This Finding of Fact now reads:

5. Evidence and direct testimony established that the student's cognitive

aptitude was within the low average to borderline category.

3. The IHO, in his Finding of Fact No. 6, determined the following:
 6. Evidence and direct testimony established that the student's Standard Score performance in the areas of academics and other school-related skills demonstrated that his tested performance were [sic] not in significant variance with his projected abilities.

The record indicates the opposite would be true. Over the five-year period of assessment materials available in the record, there are significant variances, especially in verbal areas. Documentary evidence and testimony support an opposite finding. Accordingly, the BSEA, by unanimous vote, amended the Finding of Fact as follows:

6. Evidence and direct testimony established that the student's Standard Score performance in the areas of academics and other school-related skills demonstrated that his tested performance was in variance with his projected abilities.
4. The IHO's determination that various meetings of the case conference committee occurred from May, 1996, through April, 1997, is supported by the record and is upheld by the BSEA (IHO's Finding of Fact No. 8).

5. The IHO, in his Finding of Fact No. 9, determined the following:
 9. Evidence established that the currently in force Individual Education Plan equated to and was consistent with the information available through both present and past psycho-educational assessment information.The BSEA, in review of the record as a whole, finds that the current IEP is consistent with present evaluative data. Accordingly, the Finding of Fact has been amended as follows:
 9. Evidence established that the currently in force Individualized Education Program⁴ equated to and was consistent with the information available through present psycho-educational assessment information.

6. The BSEA, by unanimous vote, determined that the IHO's Findings of Fact Nos. 10, 11, 12, and 13 are supported by the record. The student is receiving "notably low academic grades in many of his school subjects" which, in his teacher's estimation, are the result primarily of the student's "lack of scoreable work being turned in" despite the efforts of his grandparents and others. Notations in school documents dating from 1995 indicated the student was not taking responsibility for his school work. Although the School and the grandparents met often to review the student's IEP, confusion remained regarding the grading scale to be used for the student's completed work.

⁴The BSEA will insert, where appropriate and where possible, Indiana terminology from Article 7. This ensures consistency and promotes understanding where, as here, all the parties are Indiana residents.

7. The IHO, in his Finding of Fact No. 14, alluded to the “role of the required Individualized Transition Plan (ITP) component” of the IEP. Under 511 IAC 7-13-4, given the Student’s age, an ITP component would be appropriate for this Student during the 1996-1997 school year. However, no party raised an issue regarding the ITP. The issue was whether the Student’s IEP for the 1996-1997 school year was being implemented. Although the IHO made a Finding regarding a matter not in issue--and eventually fashioned an Order based upon this Finding of Fact--the BSEA believes the IHO acted responsibly by raising an area of concern so that the parties would not neglect to address the issue when developing or revising future IEPs for the Student. Accordingly, the BSEA, by unanimous vote, supports the Finding of Fact as written by the IHO.

8. The Student raises three objections to the Conclusion of Law reached by the IHO. As noted above, the parties and the BSEA are hindered in the review of this portion of the written decision because of the IHO’s failure to number his Conclusions. Nevertheless, the BSEA, by unanimous vote, supports the Conclusion of Law reached by the IHO, noting that the IHO was concluding that the School met its threshold responsibility under Article 7 for developing and implementing the Student’s IEP. The IHO did not find--and the BSEA does not find--that the School went anywhere beyond its threshold responsibility, but it did meet the procedural requirements. There is no evidence that the School acted in any other way than in “good faith.”⁵

9. The Student objects to all three of the Orders rendered by the IHO. Order No. 1, as noted above, is actually a Conclusion of Law. The BSEA upholds this Order by unanimous vote. The BSEA also notes that the IHO’s Orders Nos. 2 and 3 actually address IEP development for the 1997-1998 school year, which was not in issue. Neither party has contested the IHO’s authority to issue such orders. The issue is waived. The School, in its Response, indicated that it would implement the IHO’s Orders. Accordingly, the BSEA, by unanimous vote, upholds the IHO’s Orders Nos. 2 and 3 as written.

⁵“Good faith” is certainly a subjective term. However, this concept is addressed by the federal regulations for the Individuals with Disabilities Education Act (IDEA) at 34 CFR §300.350 at its accompanying **Note**: “...[T]his section [IEP accountability] does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the goals and objectives listed in the IEP.” The Student’s teachers, in this case, did assist the Student in achieving the goals and objectives listed in his IEP. There is no guarantee of success, and this federal regulation warns that an IEP is neither a contract nor a guarantee that any specific progress will be made.

ORDERS

In consideration of the foregoing, the Indiana Board of Special Education Appeals now issues the following Orders:

1. The Findings of Fact of the IHO are upheld as written, except Findings of Fact Nos. 5, 6, and 9, which are amended as indicated in the above “Combined Findings of Fact and Conclusions of Law.”
2. The Conclusion of Law and Order No. 1 are upheld as written.
3. The IHO’s Orders Nos. 2 and 3 are upheld as written.
4. Any issue not specifically addressed by the BSEA is deemed denied or overruled.

Date: September 8, 1997

/s/ Raymond W. Quist, Ph.D., Chair
Indiana Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this written decision to seek judicial review in a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5.